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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 381

JOHN C. ABBOTT,

Petitioner

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Petitioner, John C. Abbott, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled case on March 1, 1961.

Opinion Below

The opinion in the above-entitled case is, as of the date of this Petition, unpublished in bound volume of Court of Claims reports. A copy is contained in the record of the case certified by the United States Court of Claims (R. 111), and is also appended to this petition as Appendix A.

Jurisdiction

The judgment of the United States Court of Claims was entered on March 1, 1961 (R. 111), and Plaintiff's

Motion to Reconsider (R. 118) was filed on March 30, 1961 and was overruled on June 7, 1961 (R. 118). The jurisdiction of this Honorable Court is under Title 28 U.S.C. Section 1255.

Question Presented

Whether Plaintiff's retired pay, solely because he is an officer of a reserve rather than of a regular component of the armed services, is excluded from computation under Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942 (56 Stat. 359, 368) which is set out below:

Statute Involved

> "The retired pay of any officer of any of the services mentioned in the title of this act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 percentum of his active duty pay at the time of his retirement." Paragraph 4 of Section 15 of the Act of June 16, 1942. (P.L. 607, 77th Congress, ch. 413, 56 Stat. 359, 368; 37 U.S.C. sec. 115).

The Act's title: "An Act to Readjust the Pay and Allowances of Personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey and Public Health Service."

Statement

This is a class action. Plaintiff and 617 others petitioned the Court of Claims (R 1-4) invoking its jurisdiction under 28 U.S.C. 1491. Each asserts that having

had satisfactory service in a reserve component of the Army of the United States, he has been retired as an officer, subsequent to June 16, 1942, and granted retired pay; that such pay has been computed under the provisions of the Act of June 29, 1948 (62 Stat. 1081) as amended, but that he served in the military or naval forces of the United States prior to November 12, 1918 and is entitled to higher pay as computed under the fourth paragraph of Section 15 of the Act of June 16, 1942. Each claims the difference between the amount of such higher pay and the amount of retired pay which has been paid him since retirement (R 4, 5).

Defendant denied, for lack of sufficient information, the retirement as an officer after satisfactory service of all plaintiffs except plaintiff *Abbott*, which defendant admitted, along with the other factual assertions above set forth, but alleged that none of the plaintiffs are entitled to have their pay computed under paragraph 4 of Section 15 of the 1942 Act. (R 9, 10).

As stated by the court in its opinion (App. 1):

> " * * * On October 28, 1959, pursuant to an agreement of counsel at a pretrial conference, it was ordered by the commissioner that the claim of John C. Abbott be severed pursuant to Rule 22(b) from the claims of the other plaintiffs, and that this action be limited to the demands of John C. Abbott, with the claims of the others held in abeyance. * * *
>
> "There is no dispute as to the facts, and the case comes before the court on cross-motions for summary judgment.
>
> "Plaintiff was appointed second lieutenant, Field Artillery, Officers' Reserve Corps, on August 15, 1917. He served with the American Expeditionary Forces

in France during World War I and was discharged on May 15, 1919. Plaintiff accepted a commission as first lieutenant in the Officers' Reserve Corps on January 30, 1924. He served in the Reserves, attending meetings and summer camp from that date until he was recalled for extended active duty from May 5, 1941, to September 28, 1946. On July 31, 1953, pursuant to Title III of the Act of June 29, 1948, 62 Stat. 1081, 1087, as amended, plaintiff was placed on the Army of the United States Retired List in the grade of colonel. Since his retirement he has been paid retired pay computed in accordance with the provisions of said Act. However, plaintiff contends that he is entitled to receive retired pay equal to 75 per centum of his active duty pay at the time of his retirement, under the provisions of paragraph 4, section 15, of the Pay Readjustment Act of 1942, 56 Stat. 359, 368.

"The only question before this court is under which of the above-mentioned statutes should the retirement benefits due plaintiff be calculated."

Reasons for Granting the Writ

(1) This petition for certiorari to the Court of Claims is for review by this Honorable Court of that court's erroneous decision of an important question of federal law determinative of a large number of claims. The question has not been, but should be settled by this Honorable Court. The question arises under Section 15, Paragraph 4 of the Pay Readjustment Act of 1942 by which Congress provided for a special computation of:

"The retired pay of any officer of any of the services mentioned in the title of this Act [Army, Navy, Marine Corps, Coast Guard, etc.] who served in any capacity as a member of the military or naval forces * * * prior

to November 12, 1918, hereafter retired under any provision of law * * *."

Notwithstanding Congress' inclusive language, the Court of Claims has ruled that Congress did not intend this paragraph to apply to the retired pay of plaintiff or of any other World War I veteran who is retired as an officer of a reserve, rather than of a regular, component of a service.

(2) Decision by this Honorable Court of the broad question here raised would dispose of a key issue in a large volume of pending and prospective litigation by officers of reserve components, and also would end the uncertainty in Congress respecting legislation, if any, appropriate in the premises. Over 1800 claims are presently pending and substantially more than this number are prospective.

(3) Errors in the opinion of the Court of Claims arose from its failure to observe basic rules of statutory interpretation laid down by this Honorable Court. These errors, if not corrected, will be followed by the Court of Claims as binding precedents for its future decisions. These precedents are of particularly critical importance in the broad area of the Court of Claims' jurisdiction under 28 U.S.C. Sec. 1491 of all civil actions for pensions, or the recovery of fees, salary or compensation for official services or officers or employees of the United States. District courts are denied jurisdiction of such actions by 28 U.S.C. 1346. Hence the Court of Claims, subject only to review of this Honorable Court under 28 U.S.C. 1255, is the sole judicial forum of all such claims, by all federal civilian and military personnel.

(4) The Court of Claims has wrongly decided this case, on bases which indicate the need of this Honorable Court's corrective guidance.

Argument

This case involves no disputed question of fact. The issue here is solely whether or not Congress intended to exclude the retired pay of officers of *reserve* components of the services mentioned in the title of the Pay Readjustment Act of 1942, *supra*, from computation under the provisions of paragraph 4 of Section 15 of that Act, which reads as follows:

> "The retired pay of any officer of any of the services mentioned in the title[1] of this act who served * * * prior to November 12, 1918 hereafter retired under any provision of law * * *."

There is no dispute in the instant case as to plaintiff's fulfillment of the several conditions specified in the paragraph. The opinion of the Court of Claims in the instant case (App. 1-7) has excluded plaintiff's retired pay, along with the retired pay of all other officers of reserve components, from computation under paragraph 4 of Section 15 of the 1942 Act above referred to, solely on some theory that this paragraph is not intended by Congress to apply to any officer of any reserve component of the services. In so doing that court, in effect, has written in the words below underlined and bracketed in the following statutory language of that paragraph, evidencing the intent of Congress as to whom it applies:

> "The retired pay of any officer [of any regular component] of any of the services mentioned in the title of this act who served * * * prior to November 12, 1918, hereafter retired under any provision of law * * *."

---

[1] The services mentioned in the title of the Act are "Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service."

It would obviously require compelling circumstances to justify ascribing to Congress the intent to exclude from the above provision, all officers of all components of the armed services other than officers of their regular components. No such circumstances are shown, nor is any tenable basis apparent from the Court of Claims' opinion.

The opinion points out no absurdity which would result from construing the above statutory language according to its plain meaning, no contradiction with any other provisions of the act which would result from such plain meaning, nor any governing definitions of the statutory words at variance with such plain meaning.

The opinion may roughly be divided into two principal parts:

(a) portions supporting while ignoring the basis of the above conclusion [cited below from two prior opinions] and

(b) portions used in lieu of coming to grips with the resolution of the question here presented in the light of the rules of statutory interpretation laid down by this Court, and especially the plain language rule.

The court cited in its opinion (App. 4) its conclusion in *Berry* v. *United States*, 123 Ct. Cl. 530, 546, that this provision—

> "must be held to limit the recovery of such pay to retired officers of the regular Navy and of the regular components of the other services named therein."

and in *Reynolds* v. *United States*, 125 Ct. Cl. 108, 111, that:

> "This identical question was before this court in the *Berry* case * * * we held that section not applicable to reserve officers * * * in view of our conclusion that our decision in *Berry* v. *United States* is controlling * * *."

Berry and *Reynolds, supra,* and the instant opinion ignore a different conclusion of the Court of Claims as to the application to reserves of language substantially the same as in the instant case, in *Tanner* v. *U.S.*, 129 Ct. Cl. 792, 795.

Tanner involved prohibition of double pay under the Economy Act of 1932 (47 Stat. 382, as amended by 54 Stat. 761)—of persons receiving.

> "retired pay * * * as a commissioned officer in any of the services mentioned in the Pay Readjustment Act of 1922 * * *."

The court said, respecting the reserve officer plaintiffs:

> "The above quoted provision * * * expressly prohibits what the plaintiffs ask for. Unless that prohibition was nullified by (a later law) * * * plaintiffs cannot prevail."

The instant opinion states that (App. 6):

> "The failure of Congress to amend paragraph 4, Section 15, of the Act of 1942, in the face of the *Berry* and *Reynolds* decisions, *supra*, creates an inference of congressional approval of the court's determination in those cases which cannot be ignored by this court.
>
> "Therefore, it is our determination that the term 'Army' as used in paragraph 4, section 15 of the Pay Readjustment Act of 1942, *supra*, pertains only to regular officers and not to reserve officers. There is an old maxim, full of wisdom, which reads: *Ex facto jus oritur.*[2] We think it would not be realistic to impute to Congress an intent to afford the same benefits to reserve officers as were intended to be given to regular officers."

---

[2] Law springs from reality."

Non-action by Congress, above referred to, affords the most dubious foundation for drawing positive inferences. *United States* v. *Price*, 361 U.S. 304, 311. The court's suggestion that it would not be realistic to impute to Congress an intention to afford the same treatment of retirement pay of World War I veterans who are reserves as is afforded those who are regular, provides no foundation for its opinion, in the face of the clear language Congress used. This would be true even though such treatment might be thought unwarranted. *Comm'r.* v. *Gottlieb*, 265 U.S. 310, 314. In *Gottlieb* the court said:

> "The contention that it is absurd and unreasonable to say that the wives and children of ministers from the barred Asiatic Zone are to be admitted and those outside of it denied admission, does not require consideration, since the result we have stated necessarily follows from the plain words of the law, for which we are not at liberty to substitute a rule based upon other notions of policy or justice."

The validity of *Berry* and *Reynolds* which the opinion states governs the instant case (App. 6) cannot rise above the validity of the bases on which these opinions rest. The validity of these bases was the heart of the controversy in the instant case in the Court of Claims. The opinion never discusses them.

The factual situation pertinent to the decisions in *Berry* and *Reynolds* and in the instant case are the same. That those two cases dealt with officers of a reserve component of the Navy while petitioner is an officer of a reserve component of the Army, is not differentiated in the court's dispositive conclusion that the language in issue does not apply to officers of any reserve components. The bases on which the conclusion was based in the opinion in *Berry* was exhaustingly contested before the court in the instant case.

That of *Reynolds* was not, as it merely cited and relied on the conclusion in *Berry* as determinative of the issue.

But, apparently in support of *Reynolds* as an important precedent, the Court stated (App. 5):

> "Further, the plaintiff does not attempt to distinguish the present case from *Reynolds* v. *United States, supra,* and we are of the opinion that the cases are similar on all fours."

Apparently both in support of both *Berry* and *Reynolds* as binding precedents, and as explanation for the court's failure to examine their bases, the court also stated (App. 6):

> "It is the court's view that the *Berry* and *Reynolds* cases, *supra,* fully detailed the origin of paragraph 4, section 15, of the 1942 Act. In each of those decisions the court sufficiently examined the legislative intent of both the 1942 and 1948 Acts and properly determined that the provisions of the 1942 Act did not apply to retirees under Title III of the 1948 Act. Such determination is controlling here."

It might be noted parenthetically that the prior and instant holding was not limited to exclusion under the 1942 Act of retirees under the 1948 Act. It excluded from the 1942 Act any officer of any reserve component retired under any act.

Notwithstanding the above statement respecting the court's sufficient examination of legislative intent in *Berry* and *Reynolds*, cited in support of its broad conclusion governing reserves of all services, the court designates

as the key question in the instant case one not previously considered in those cases. The court says (App. 3):

> "We are of the opinion that the solution of the present controversy hinges on the definition of the term 'Army.'"

If the statement is correct, the opinions in *Berry* and *Reynolds* should have been hinged on the definition of Navy, but were entirely silent about that definition and were decided on an entirely different basis. Accordingly, relying on them as controlling here without reviewing the basis of their conclusions is erroneous.

The above statement of the key importance of "Army" would seem to admit the pertinence of the extensive presentation below by petitioner of the historical development and 1942 status of the concept of "Army", "Navy", and "Coast Guard" and the administrative and legislative usage of those terms with respect to the inclusion of their components at the time of the 1942 Pay Readjustment Act.

Petitioner's presentation showed the specific inclusion of reserve components in the Army of the United States, along with the Regular Army, by the National Defense Act of June 3, 1916 (39 Stat. 166). It showed the similar inclusion of the reserve components in the Navy by the Naval Reserve Act of 1938, (52 Stat. 1175) and of reserves in the Coast Guard by a similar act (55 Stat. 9) written by the same Congress that wrote the Pay Act here in question.

Petitioner demonstrated that the meaning of Army, Navy, etc. within the context of the language of the 1942 Act included all components of these services. Plaintiff showed that in its common usage meaning the language here in issue (as now admitted by the court with respect

to "Army" (App. 3)) refers to the entire services, not to just their regular components, and that this inclusive meaning is confirmed by contemporary dictionary definitions, administrative usage and legislative usage in various parts of the 1942 Act, and in numerous other acts written by the same Congress that wrote the 1942 Act. Yet none of this was presented to the court or considered in its opinion in *Berry* which, according to the court, controls the instant case. Though this material was presented to the court below by petitioner, it was not considered in the instant opinion, even though the opinion states that (App. 3) the "present controversy hinges on the definition of the term 'Army.'"

The Court does not erase the error implicit in the situation by its statement (App. 5):

> "The plaintiff contends that the *Berry* case, *supra*, should not control the decision in the instant case because neither counsel presented background material which would help the court define the term 'Navy.' It is ironic that plaintiff argues that background information was not presented to define the term 'Navy' in that case but urges us to ignore background material as an aid to defining the term 'Army' in the present case."

The last sentence above quoted presumably refers to petitioner's insistence on the application of the plain meaning rule, which will be presently discussed.

The Court makes a further statement (App. 2-3):

> "Plaintiff earnestly insists that the term 'Army' is synonymous with the term 'Army of the United States' and urges upon us the definition adopted in Section 2 of the Army Organization Act of 1950 (64 Stat. 263) as definitive of the meaning of the term in 1942."

The above statement requires a clarifying comment. In concluding his presentation that "Army" as used popularly, administratively and legislatively meant the entire army at the time the language here at issue was written, petitioner referred to House Report No. 2110, accompanying the Act of June 28, 1950 (64 Stat. 263) which stated the following respecting the definition of "Army" in that Act:

> "It will make no change in the substance of existing law but will make it clear that the army includes, in addition to the components and members of those components, all persons appointed, enlisted or inducted in the army without specification of component."

The above report also, in referring to the Act's definition of "Regular Army," stated:

> "By the enactment, on June 3, 1916, of Section 1 of the National Defense Act, the Regular Army became a component of the Army of our Nation."

It is submitted that thus evidencing the broad meaning of "Army" does not place petitioner in the position of arguing for a retroactive application of a definition of "Army."

The Court admitted (p. 3) that

> "Section 2 of Title 10, before 1950, defined the composition of the Army of the United States * * *."

It might be added that this definition, specifically including all components, regular and reserves, was amended by the same Congress that wrote the language here in question and exactly fitted the above quoted statement in House Report No. 2110 as to the pre-1950 meaning of Army.

The court, however, viewed the situation as follows (App. 2-3):

> "Plaintiff earnestly * * * urges upon us the definition adopted in Section 2 of the Army Organization

> Act of 1950, * * * as definitive of the meaning of the term in 1942. However, prior to the adoption of this definition the Code was silent as to the meaning to be given the term 'Army.' "

Though with the above remark largely dismissing the pertinent material on the question, the court then conceded one important point, the normal signification of "Army", but added an untenable conclusion, in the following statement (App. 3):

> "Admittedly, the Act of 1950 made the terms synonymous by conforming the technical meaning of the term 'Army' with the meaning implied by common usage, but to our minds this would strengthen the proposition that a distinction was intended prior to the adoption of the new definition. Therefore, a determination would have to be made as to the meaning of the term 'Army' in any given instance. Hence, we must make that determination in the instant case."

Notwithstanding the opinion (App. 3) that "the solution of the present controversy hinges on the definition of the term 'Army,' " the only determination in the opinion referenced to Army (App. 6) is in the second of two paragraphs previously quoted. The first points out the failure of Congress to amend the provision here in issue "in the face of the *Berry* and *Reynolds* decision." The first sentence of the second paragraph states (App. 6):

> "Therefore, it is our determination that the term 'Army' as used in paragraph 4 * * * pertains only to regular officers * * * ."

No other basis is given for this "determination".

But the Court had already stated (App. 5):

> "In the instant case, we have determined that the 1942 Act did not apply to reserve officers".

This suggests that possibly the basis of the determination about "Army" was also to conform it to the broader basis of the prior determination.

As will be shown below, the Court's concern with the definition of "Army" appears to be directed principally to its use as an escape from the *consequences* of the clear meaning rule if properly applied to the instant case. The Clear Meaning rule was not reckoned with in *Berry*, and its proper application there, and to the present case, petitioner believes, would be decisive. The opinion states (App. 3-4):

> "Plaintiff insists that extrinsic aids to statutory interpretation such as legislative intent be precluded and only the words apparent on the face of the Act be given meaning. If this were a case of first impression, the court would not accept the blinders offered by the plaintiff and would fully explore the background material to determine the legislative intent."

The opinion, however, avoided both petitioner's "blinders" and "background material".

The opinion refers to the plain language rule and states (App. 3):

> "This rule was announciated by the Supreme Court in *Lake County* v. *Rollins*, 130 U.S. 662, 670. * * * We do not quarrel with this rule."

The philosophy and application of the clear meaning

rule is summarized in two sentences in *Rollins*. The first of these, which the opinion ignores is that (p. 670):

> "To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them."

The opinion is silent as to the natural signification of the words in the title of the Pay Readjustment Act of 1942. This act which governed the pay and allowances of the greatest fighting force in our history includes in the title: "the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service". Paragraph 4 of Section 15 of that act applies to

> "The retired pay of any officer of any of the services mentioned in the title of this act" who had World War I service and who "hereafter retired under any provision of law".

The question of whether the natural signification of the above words is inclusive of the officers of all the components of all the services who meet the paragraph's other requirements is self answering.

The Court below reckons only with the provision in *Rollins* in the sentence following the one just discussed. The opinion (App. 3) makes the following statement in which the last sentence is substantially that laid down by *Rollins* (after the statement previously quoted respecting the natural signification of words):

> "Plaintiff's position is that a reserve officer is clearly an 'officer of any of the services' referred to in paragraph 4, section 15, of the 1942 Act. Fur-

> ther, that the established rule of statutory interpretation, which plaintiff refers to as the ABC rule, applies to paragraph 4, section 15. This rule was annunciated by the Supreme Court in *Lake County* v. *Rollins*, 130 U.S. 662, 670. The plaintiff's interpretation of this rule is (a) when the words of a statute convey a definite meaning, (b) which involves no absurdity, (c) nor contradiction of other parts of the statute, then the meaning apparent on the face of the statute must be accepted and the courts have no right to add to it or take away from it."

Following this statement the court "applied" the rule as follows (App. 3):

> "We are of the opinion that the solution of the present controversy hinges on the definition of the term 'Army'. It is our determination that this term is capable of more than one meaning. This is substantiated by plaintiff's own reference to a definition. Therefore, in applying this determination to part A of plaintiff's ABC rule, it is apparent that the words of the statute do not convey a definite meaning."

This Honorable Court has given no sanction for the "capable of more than one meaning" approach of the Court of Claims. Quite differing are examples afforded by the opinions of this honorable court.

Unquestionably "Army" out of context is "capable of more than one meaning." So is "vessel". But in context and for resolving the particular issue before the Court in *Dewey* v. *U.S.*, 178 U.S. 510, 511, there was no doubt of the plain meaning of "if the enemy's vessel was of inferior force".

As recently stated by this Honorable Court in *Yates* v. *U. S.*, 354 U.S. 298, 311:

> "We, too, think this statute should be read 'according to the natural and obvious import of the language, without resort to subtle and forced construction for the purpose of either limiting or extending its operation.' *United States* v. *Temple*, 105 U.S. 97, 99."

It is submitted that the opinion of the Court of Claims in the instant case is most seriously in error in its views respecting the application of the plain meaning rule.

The opinion does not state any reasons indicative of even the plausibility of Army meaning "Regular Army." Certainly to assign such meaning to "Army" in the title of the act governing the pay and allowances of all components of all the several services, would be less than convincing. Yet the application of the provision here in issue, to officers of reserve components, was stated by Congress to apply to "any officer of any of the services mentioned in the title of this act." But the Court of Claims on an assigned basis of Congressional inaction after its decisions in *Berry* and *Reynolds* has ruled out officers of all reserve components. It is submitted that the several foregoing errors warrant review by this Honorable Court of the case here presented.

In view of the purpose and scope of this petition, no analysis is here made of the several inaccuracies and inadequacies, and failure to follow this Court's interpretative rules, in the *Berry* opinion.

Petitioner earnestly believes that granting this petition and considering this case on the merits would correct an injustice and would serve the ends of justice.

Conclusion

For the reasons given above, Petitioner Abbott respectfully submits that this petition should be granted.

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Appendix A

In the United States Court of Claims

No. 235–59

(Decided March 1, 1961)

JOHN C. ABBOTT, ET AL. v. THE UNITED STATES

Leonard J. Calhoun for plaintiff. *Charles B. Rugg* was on the briefs.

Paris T. Houston, with whom was *Acting Assistant Attorney General Geo. S. Leonard*, for defendant. *Thomas A. Hett* was on the briefs.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

This is a suit for the difference in the amount of retirement pay actually received under the provisions of 62 Stat. 1081, and the amount plaintiffs allege is due them under provisions of 56 Stat. 359.

On May 29, 1959, plaintiff, John C. Abbott, and 617 others, filed the petition in this case. On October 28, 1959, pursuant to an agreement of counsel at a pretrial conference, it was ordered by the commissioner that the claim of John C. Abbott be severed pursuant to Rule 22(b) from the claims of the other plaintiffs, and that this action be limited to the demands of John C. Abbott, with the claims of the others held in abeyance. Henceforth, all reference herein to "plaintiff" refers to John C. Abbott.

There is no dispute as to the facts, and the case comes before the court on cross-motions for summary judgment.

Plaintiff was appointed second lieutenant, Field Artillery, Officers' Reserve Corps, on August 15, 1917. He served with the American Expeditionary Forces in France during

World War I and was discharged on May 15, 1919. Plaintiff accepted a commission as first lieutenant in the Officers' Reserve Corps on January 30, 1924. He served in the Reserves, attending meetings and summer camp from that date until he was recalled for extended active duty from May 5, 1941, to September 28, 1946. On July 31, 1953, pursuant to Title III of the Act of June 29, 1948, 62 Stat. 1081, 1087, as amended, plaintiff was placed on the Army of the United States Retired List in the grade of colonel. Since his retirement he has been paid retired pay computed in accordance with the provisions of said Act. However, plaintiff contends that he is entitled to receive retired pay equal to 75 per centum of his active duty pay at the time of his retirement, under the provisions of paragraph 4, section 15, of the Pay Readjustment Act of 1942, 56 Stat. 359, 368.

The only question before this court is under which of the above-mentioned statutes should the retirement benefits due plaintiff be calculated.

Paragraph 4, section 15, of the Pay Readjustment Act of 1942, *supra*, reads:

> The retired pay of any officer of any of the services mentioned in the title of this Act [Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service] who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement. (p. 368)

Plaintiff insists that he fulfills all the requirements of the above-quoted provision because (1) he is an officer who served in "any capacity" as a member of the military forces of the United States prior to November 12, 1918, and (2) he was "hereafter retired under any provision of law." However, defendant contends that this section of the Act pertains only to regular officers and was not intended to include reserve officers.

Plaintiff earnestly insists that the term "Army" is synonymous with the term "Army of the United States"

and urges upon us the definition adopted in section 2 of the Army Organization Act of 1950, 64 Stat. 263, as definitive of the meaning of the term in 1942. However, prior to the adoption of this new definition the Code was silent as to the meaning to be given the term "Army". Section 2 of Title 10, before 1950, defined the composition of the Army of the United States, and section 3 of that Title defined the Regular Army. Admittedly, the Act of 1950 made the terms synonymous by conforming the technical meaning of the term "Army" with the meaning implied by common usage, but to our minds this would strengthen the proposition that a distinction was intended prior to the adoption of the new definition. Therefore, a determination would have to be made as to the meaning of the term "Army" in any given instance. Hence, we must make that determination in the instant case.

Plaintiff's position is that a reserve officer is clearly an "officer of any of the services" referred to in paragraph 4, section 15, of the 1942 Act. Further, that the established rule of statutory interpretation, which plaintiff refers to as the ABC rule, applies to paragraph 4, section 15. This rule was announciated by the Supreme Court in *Lake County* v. *Rollins*, 130 U.S. 662, 670. The plaintiff's interpretation of this rule is (a) when the words of a statute convey a definite meaning, (b) which involves no absurdity, (c) nor contradiction of other parts of the statute, then the meaning apparent on the face of the statute must be accepted and the courts have no right to add to it or take away from it. We do not quarrel with this rule. Nevertheless, its application in the instant case does not lead us to the result reached by the plaintiff. We are of the opinion that the solution of the present controversy hinges on the definition of the term "Army". It is our determination that this term is capable of more than one meaning. This is substantiated by plaintiff's own reference to a definition. Therefore, in applying this determination to part A of plaintiff's ABC rule, it is apparent that the words of the statute do not convey a definite meaning. Plaintiff insists that extrinsic aids to statutory interpretation such as legislative intent be precluded and only the words apparent on the face of

the Act be given meaning. If this were a case of first impression, the court would not accept the blinders offered by the plaintiff and would fully explore the background material to determine the legislative intent. However, this court recently pointed out in *Fox* v. *United States*, No. 216-59, decided December 1, 1960:

> Plaintiff's position is that he has satisfied each and every provision of law to entitle him to the statutory payment. He sees the statute as susceptible of only one interpretation and, therefore, resists any reference to its legislative background. As a basic principle in construing legislation it is undoubtedly sound to refrain from introducing extraneous considerations where the meaning of the law is clear and unmistakable. By no means do we reject this doctrine.
>
> But words do not have meaning in and of themselves. They serve as a medium of communication only to the extent that they are given meaning by placing them in their proper perspective in relation to facts, circumstances, and attitudes. Words are symbols but their meanings are rarely, if ever, unequivocally clear without some necessary reference to extrinsics.

Thus, it is not necessary for this court to examine the intended scope of paragraph 4, section 15, of the 1942 Act, or to outline its legislative history. This has already been done. *Berry* v. *United States*, 123 Ct. Cl. 530, 546 (1950). In that case the court said:

> * * * it is apparent that the fourth paragraph of § 115 must be held to limit the recovery of such pay to retired officers of the Regular Navy *and of the Regular components of the other services named therein.* [Italic supplied.]

The identical question appeared again in *Reynolds* v. *United States*, 125 Ct. Cl. 108 (1953), and was answered by the court in the following language:

> This identical question was before this court in the *Berry* case, *supra*. In that case we held that section 115 of Title 37, U.S. Code, was not applicable to reserve officers, * * *. [p. 111]

* * * * *

> In view of our conclusion that our decision in *Berry* v. *United States*, *supra*, is controlling in this case, we find it unnecessary to decide whether retirement under the provisions of Title III of the Army and Air Force Vitalization and Retirement Act of 1948 requires that the retired pay received be computed in accord with that statute and not under any other. [p. 114]

The plaintiff contends that the *Berry* case, *supra*, should not control the decision in the instant case because neither counsel presented background material which would help the court define the term "Navy". It is ironic that plaintiff argues that background information was not presented to define the term "Navy" in that case but urges us to ignore background material as an aid to defining the term "Army" in the present case. However, plaintiff does argue this position and relies on *Danielson* v. *United States*, 121 Ct. Cl. 533, 545 (1952), wherein the court stated:

> * * * there was no debate of a revealing nature on paragraph 4 of Section 15 as finally enacted.

Plaintiff overlooks the fact that this language was expressly repudiated in the *Berry* decision, *supra:*

> * * * despite our earlier conclusion, we do have before us revealing evidence of the intended scope of this paragraph. [p. 546]

Further, the plaintiff does not attempt to distinguish the present case from *Reynolds* v. *United States*, *supra*, and we are of the opinion that the cases are similar on all fours. Instead, the plaintiff relies heavily on *Yarnall* v. *United States*, 131 Ct. Cl. 111, as authority for the proposition that one can retire under the provisions of one statute and receive the benefits contained in a previous statute. As in the instant case, Yarnall was retired under the provisions of Title III of the 1948 Act. The Act under which Yarnall sought to have his benefits calculated was section 412(a) of the Officer Personnel Act of 1947, 61 Stat. 795, 874. This 1947 Act was expressly applicable to reserve officers and as such was held applicable to Yarnall. Therefore, he was entitled to receive its benefits. In the instant case, we have determined that the 1942 Act did not apply to reserve officers, so the question whether one can retire under the provisions of one statute and receive benefits contained in

another statute is not relevant because it could be answered in the affirmative and it would not aid plaintiff's cause. The court agrees with plaintiff that the true basic issue was whether Yarnall was "retired" within the meaning of section 412(a) of the 1947 Act and it was held that he was. In the instant case the true basic issue is whether plaintiff comes within the meaning of paragraph 4, section 15, of the 1942 Act, and we hold he does not.

The status of retirement for military personnel and the right to and the amount of retired and retirement pay are created and controlled by statute. If there is no statutory authorization for payment then the claimant is not entitled to any payment as a matter of right. Plaintiff is one of several thousand similarly retired reserve officers for whose benefit many unsuccessful legislative efforts have been made.[1]

The failure of Congress to amend paragraph 4, section 15, of the Act of 1942, in the face of the *Berry* and *Reynolds* decisions, *supra*, creates an inference of congressional approval of the court's determination in those cases which cannot be ignored by this court.

Therefore, it is our determination that the term "'Army" as used in paragraph 4, section 15, of the Pay Readjustment Act of 1942, *supra*, pertains only to regular officers and not to reserve officers. There is an old maxim, full of wisdom, which reads: *Ex facto jus oritur.*[2] We think it would not be realistic to impute to Congress an intent to afford the same benefits to reserve officers as were intended to be given to regular officers.

It is the court's view that the *Berry* and *Reynolds* cases, *supra*, fully detailed the origin of paragraph 4, section 15, of the 1942 Act. In each of those decisions the court sufficiently examined the legislative intent of both the 1942 and 1948 Acts and properly determined that the provisions of the 1942 Act did not apply to retirees under Title III of the 1948 Act. Such determination is controlling here.

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[1] S. 1330 and S. 2448, 82d Congress; S. 362 and S. 1330, 83d Congress; S. 362, S. 1643, H.R. 6017, H.R. 6408, H.R. 11574, 84th Congress; S. 1085, S. 1622, S. 2083, H.R. 689, H.R. 4296, H.R. 4600, H.R. 9031, 85th Congress; S. 1209, S. 1655, H.R. 1136, H.R. 4296; H.R. 5272, 86th Congress.

[2] Law springs from reality.

Plaintiff's motion for summary judgment is denied, and defendant's motion for summary judgment is granted. The petition as to plaintiff John C. Abbott (1) will be dismissed.

It is so ordered.

DURFEE, *Judge;* MADDEN, *Judge;* and JONES, *Chief Judge,* concur.

WHITAKER, *Judge,* took no part in the consideration and decision of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHN C. ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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WILLIAM H. ORRICK, JR.,
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OPINION BELOW

The opinion of the Court of Claims (Pet App. 1-7) is reported at 287 F. 2d 573.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961. A timely motion to reconsider was overruled on June 7, 1961. The petition for a writ of certiorari was filed on September 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner, a retired reserve officer with service prior to November 12, 1918, is entitled to have his retired pay computed in accordance with paragraph 4, Section 15, of the Pay Readjustment Act of June 16, 1942.

STATUTE INVOLVED

Paragraph 4 of Section 15 of the Pay Readjustment Act of June 16, 1942, 56 Stat. 359, (as amended, 37 U.S.C. 115), provides:

> *An Act to Readjust the Pay and Allowances of Personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.*
>
> * * * *
>
> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

STATEMENT

Petitioner was appointed second lieutenant, Field Artillery, Officers' Reserve Corps, on August 15, 1917. He served with the American Expeditionary Forces in France during World War I and was discharged on May 15, 1919. He accepted a commission as first lieutenant in the Officers' Reserve Corps on January 30, 1924, and served in the Reserves, attend-

ing meetings and summer camp from that date until he was recalled for extended active duty from May 5, 1941, to September 28, 1946. On July 31, 1953, pursuant to Title III of the Act of June 29, 1948, 62 Stat. 1081, 1087, as amended, petitioner was placed on the Army of the United States Retired List in the grade of colonel. Since his retirement he has been paid retired pay computed in accordance with the provisions of that Act. Pet. App. 1-2.

By this suit, petitioner, who had served in reserve components of the United States Army prior to November 12, 1918, seeks retired pay computed in accordance with Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, *supra*, rather than the lower pay that he has received under the provisions of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, 1087.[1] Pet. App. 2.

On cross-motions for summary judgment, the Court of Claims held that Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942 applied only to regular components and not to reserve components of the Services enumerated in the title of the Act. Accordingly, the court granted the government's motion for summary judgment and dismissed the petition. Pet. App. 6, 7.

ARGUMENT

This Court has previously denied certiorari to review a Court of Claims decision presenting the iden-

[1] Approximately 1800 similar claims are being held in abeyance by the Court of Claims pending the final disposition of petitioner's claim.

tical issue raised by the present petition. *Reynolds* v. *United States*, 125 C. Cls. 108, certiorari denied, 346 U.S. 826. Adhering to its decisions in *Reynolds* as well as in *Berry* v. *United States*, 123 C. Cls. 530, the Court of Claims has once again held that a member of a reserve component of the military service is not entitled to the retired pay benefits prescribed by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942. Though there are numerous similar claims pending in the Court of Claims (*supra*, n. 1), the court's decision is clearly correct and further review by this Court is not warranted.[2]

The legislative history and background of the Pay Readjustment Act of 1942, and related acts, clearly demonstrate that Congress intended the Act to apply only to officers retired from the regular components of the enumerated services. The history and background of the 1942 Act were canvassed by the court below in *Berry* v. *United States*, 123 C. Cls. 530 and in *Reynolds* v. *United States*, 125 C. Cls. 108,[3] where the court held that officers retired from the Naval Reserve were not entitled to have their retirement

---

[2] Since the *Berry* and *Reynolds* decisions, measures to amend Section 15 to include retired reserve officers have uniformly failed of passage. See S. 2448, 82nd Congress; S. 1330, 83rd Congress; S. 362, S. 1643, H.R. 6017, H.R. 6408, H.R. 11574, 84th Congress; S. 1085, S. 1622, S. 2083, H.R. 689, H.R. 4600, H.R. 9031, 85th Congress; S. 1209, S. 1655, H.R. 1136, H.R. 4296, H.R. 5272, 86th Congress.

[3] See 123 C. Cls. at 543-546; 125 C. Cls. at 112-114.

pay computed in accordance with the 1942 Act. Of course, the same result obtains as to petitioner who is retired from the reserve component of the Army.

To avoid these precedents and to avoid the impact of the history of the 1942 Act, petitioner asserts that it was improper for the court to look beyond the Act to ascertain Congressional intent and that the court was bound to give to the word "Army", appearing in the title of the Act, its literal and broadest meaning so as to encompass both the Army of the United States (denoting the reserve Army component) as well as the United States Army (denoting the regular component). We dispute that the meaning of the term "Army", in a statute of this type, is "popularly, administratively and legislatively" (Pet. 13) so clear and well understood as to foreclose inquiry beyond the bare language of the statute. But in any event, it is now too late to question that it is the function of the courts, in construing and applying statutes, "to construe the language so as to give effect to the intent of Congress." *United States* v. *American Trucking Associations*, 310 U.S. 534, 542. See also, *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48; *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U.S. 325, 333. The construction given the term "Army" by the Court of Claims in this case is in accord with Congressional intent (see *supra*, n. 4, p. 3) and petitioner is entitled only to the pay prescribed by the Act under which he is retired—The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
Attorney.

SEPTEMBER 1961

SUPREME COURT, U. S.

FILED

OCT 6 1961

JAMES R. BROWNING, CLERK

No. 381

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961

JOHN C. ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Reynolds' Petition

Respondent brings in as germane to this Petition (p. 3) this Honorable Court's failure to grant certiorari in *Reynolds v. United States*, 125 C. Cls. 108, certiorari denied, 346 U.S. 826, notwithstanding that, as stated by Stern and Gressman at page 132-133 Supreme Court Practice—

> "A simple order denying a petition for a writ of certiorari is not designed to reflect the court's views

> either as to the merits of the case or as to its jurisdiction to hear the matter. The court has frequently reiterated that 'the denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times.' Hence a denial *is not a precedent for like action in a similar case;* nor is it authority which can be properly cited in support of any proposition of law." (*Italics* supplied).

Reynolds' basic contention was that, regardless of congressional intention in 1942, failure to repeal paragraph 4 of Section 15 of the Pay Readjustment Act in connection with enactment of a 1949 Retirement Act showed that Congress intended in 1949 that paragraph 4 should apply to reserve officers. Rejection of this conclusion was the basic reason for Reynolds' petition for certiorari, which was not granted.

The Court of Claims reviewed at length Reynolds' contention in the light of the material in his brief—in contrast with its action in the present case. The court's opinion dealing with the history of the 1949 Act (125 Ct. Cls. at 112-114) is incorrectly cited by Respondent (p. 4, n. 2) as "The history and background of the 1942 act." The court stated in *Reynolds* (125 Ct. Cls. at 114) "Re-enacted sections of a statute must be given the same meaning they had in the same statute unless a contrary intention is plainly manifest * * *" with which Petitioner Abbott agrees. Thus Reynolds' petition was on an essentially different basis than is the present petition. Petitioner Abbott's contention is based solely on refusal of the court to consider new material and to follow proper interpretative rules in arriving at the intent of Congress in 1942.

Bills and Congressional Intent

Respondent states (p. 4, n. 2):

> "Since the *Berry* and *Reynolds* decisions, measures to amend Section 15 to include retired reserve officers have uniformly failed of passage. See S. 2448, 82nd Congress; S. 1330, 83rd Congress; * * * S. 1085 * * * H.R. 689 * * * 85th Congress * * *" etc.

The first bill, S. 2448, *supra*, was introduced *before* the *Berry* decision and the second, S. 1330 *supra*, *before* the *Reynolds* decision. Respondent did not and could not, point to any action, or even hearing on any bill cited.

It would seem axiomatic that even enactment of positive legislation by a later Congress in no way affects the correctness and soundness of a court's decision (such as occurred, for example, after the *Silk* and *Gregoran* cases, 331 U.S. 704). Obviously mere inaction by a later congress after mere introduction of bills, has no significance in evaluating the correctness and soundness of *Berry*, *supra*.

Certainly as germane to the issue as is respondent's reference to these bills, is the purpose, basis and background of the bills themselves as evidenced by their authors. For example, in respect of S. 1085, *supra*, its author, Senator Sparkman, states (103 Cong. Rec., 85th Cong., p. 3491):

> "its purpose is not to enact a new law or to extend the provisions of an existing law, but is to affirm the long-standing policy of Congress to treat reservists the same as regulars by clarifying paragraph 4, Section 15 of the Pay Readjustment Act of 1942 so as to insure its correct interpretation by the affected Governmental agencies * * *

> "This clarification is necessary because Government agencies have held in effect that the words 'any officer' means 'any regular officer,' thus reading into the law a limitation not put there by Congress and depriving reserve officers, otherwise qualified for retirement and clearly included in the words 'any officer' of 75 per cent special retired pay to which they were entitled for the same World War I service."

Congressman Huddleston, the author of H.R. 689, *supra*, made similar remarks and placed in the record evidence of the intent of Congress in 1942 in writing paragraph 4 of Section 15 of the 1942 Pay Readjustment Act (103 Congressional Record, 85th Congress, p. 5303 and App. page A3754).

This evidence included statements of two former senators, both members of the Senate Committee, and one Chairman of its Subcommittee, which wrote the 1942 Pay Readjustment Act. The statement of former Senator Johnson of Colorado in a letter to Congressman Huddleston (p. 5303 *supra*) in part, was:

> "* * * as the Senate sponsor and Chairman of the Subcommittee handling the Pay Readjustment Act of 1942, and as a member of the Senate-House conference which wrote the very paragraph which is the subject of your bill, I say without reservation that it was clearly the understanding and intention of the Senate in 1942 that there be no discrimination between Regular, Reserve or National Guard officers in pay for similar services.
>
> "I think the Comptroller General and the Court of Claims were in error in holding otherwise."

The other statement (App. A 3754 *supra*), that of former Senator Chan Gurney, reads in part:

> "* * * I have carefully read your remarks inserted in the Congressional Record for February 14, 1957 and April 8, 1957, especially noting the reprint of a letter you received from former Senator Edwin C. Johnson of Colorado. I concur in the Senator's remarks that it was the intention of the Committee in the Senate of which I was a member at that time that there should be no discrimination between the Regulars, the Reserve or National Guard officers.
>
> "* * * I do remember vividly the efforts of our Committee and the intent of Congress in equalizing retirement benefits * * *
>
> "* * * We were using every effort to bring back into the service the only experience that was available at the start of World War II, and that experience needed so badly was only had by those officers who had served in World War I.
>
> "* * * in my opinion a contract was made with those who did come back on active duty under the intent of Congress at the time the bill was passed."

Failure to Review New Material

Respondent's statement (p. 4) that—

> "The history and background of the 1942 Act were canvassed by the Court below in *Berry* v. *United States*, 123 C. Cls. 530 and in *Reynolds* v. *United States*, 125 C. Cls. 108[3] * * *
>
> "[3] See '123 C. Cls. at 543-546; 125 C. Cls. at 112-114.'"

must be taken in the light of Petitioner's unchallenged showing (1) of the refusal of the court below to review the basis of its conclusion in *Berry* as to Congress' intent in

1942 in the light of pertinent new analysis and background material by Petitioner, and (2) that *Reynolds* merely cited the *Berry* conclusion as controlling. As mentioned, *supra*, the above cited part of the *Reynolds* opinion discussed history and background of a 1949 act, irrelevant to *Abbott's* petition.

The Interpretation of "Army"

Respondent's statement (p. 5) that—"The construction given the term 'Army' by the Court of Claims in this case is in accord with Congressional intent (see *supra*, n. 4, p. 3) * * *" may be intended to refer to footnote 3 on page 4 of Respondent's brief, as the brief contains no footnote 4, and page 3 does not appear to be germane.

But, as cited in Petitioner's brief, page 8, the basis of its definition of "Army" which the court itself stated (Pet. Br. App. 6) was—

> "The failure of Congress to amend paragraph 4, section 15, * * * in the face of the *Berry* and *Reynolds* decisions, *supra*, creates an inference of congressional approval of the court's determination in those cases which cannot be ignored by this court.
>
> "Therefore, it is our determination that the term 'Army' * * * pertains only to regular officers and not to reserve officers."

Respondent, seemingly in an attempted defense of the Court of Claims' approach in defining "Army" states (p. 5) rather cryptically—

> "But in any event, it is now too late to question that it is the function of the courts, in construing and applying statutes 'to construe the language' so as to give effect to the intent of Congress. *United States* v. *American Trucking Association*, 310 U.S. 534, 542."

This cited opinion certainly offers no defense to the interpretative approach taken by the Court of Claims. It states (p. 543)—

> "There is of course no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose rather than the literal words."

It is submitted that neither absurdity, futility nor variance with policy was found, and that the opinion below failed to reach its conclusions in conformity with the opinions cited by respondent.

Reasons for Certiorari

Respondent's brief is principally significant for what it does *not* contest, i.e.—

1. That the opinion below shows no circumstances to justify ascribing an intent on the part of Congress, despite its plain language, to exclude reserve officers from the scope of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942.

2. That the Court of Claims refused to consider important background material submitted by Petitioner, and not previously before the court, and while paying lip service to

the plain language rule, failed to apply it according to the rules laid down by this Honorable Court.

3. That decision by this Honorable Court of the broad question here raised would (a) provide the court below needed guidance in the basic rules of statutory interpretation, (b) dispose of a large volume of similar claims, (c) end the uncertainty in the Congress as to legislation, if any, needed, and (d) correct the interpretative doctrine of the opinion below—which is particularly important to federal civilian and military personnel as the Court of Claims is their sole forum for their pay claims, subject only to the jurisdiction of this Honorable Court.

Conclusion

For the foregoing reasons and others set out in the petition, it is respectfully submitted that the petition should be granted.

LEONARD J. CALHOUN,
Attorney for Petitioner.

(9002-7)